

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES
ATLANTA BRANCH OFFICE

TARMAC AMERICA, INC.

and

CASES 12-CA-22501
12-CA-22595

INTERNATIONAL UNION OF OPERATING
ENGINEERS, LOCAL 487, AFL-CIO

John F. King, Esq., for the General Counsel.
Arturo Ross, Esq., of *Fisher & Phillips, LLC*,
Ft. Lauderdale, FL, for the Respondent.
Osnat K. Rind, Esq., of *Phillips, Richard & Rind*,
P.A., Miami, FL, for the Charging Party.

DECISION

Statement of the Case

MICHAEL A. MARCIONESE, Administrative Law Judge. I heard this case in Miami, Florida on July 7 and 8, 2003. International Union of Operating Engineers, Local 487, AFL-CIO, "the Union" or "Local 487", filed the charges in Case Nos. 12-CA-22501 and 12-CA-22595 on September 26, 2002 and November 4, 2002, respectively. On January 29, 2003, an order consolidating cases, consolidated complaint and notice of hearing issued alleging that Tarmac America, Inc., the Respondent, violated Section 8(a)(1) and (5) of the Act. Specifically, the complaint alleges that the Respondent has unlawfully refused to recognize and bargain with the Union as the representative of the forklift operator/yardman employed at the Respondent's Ft. Pierce, Florida facility and has failed and refused to apply the parties' collective-bargaining agreement to that employee since in or about August, 2002; and has failed and refused to furnish the Union with information it requested on October 18, 2002 regarding the disputed position. On February 12, 2003, the Respondent filed its answer to the complaint, denying the unfair labor practice allegations and asserting several affirmative defenses. Specifically, the Respondent asserted that the position in dispute was a new classification and not a proper accretion to the unit; that the Union had never been designated or selected by a majority of unit employees as their bargaining representative; and that the Union was not a valid successor to the certified union.¹

¹ Although the Respondent pursued the latter two defenses with vigor during the hearing, it failed to address the issues raised by these defenses in its brief. To the extent that the Respondent still contests the Union's authority to represent the employees in the unit, I adhere to my rulings at the hearing that any challenge to the Union's representative status is barred by Section 10(b) of the Act because the Respondent had recognized and bargained with the Union for more than six months before any charge was filed. *Route 22 Auto Sales*, 337 NLRB No. 10

On the entire record,² including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel and the Respondent, I make the following:

Findings of Fact

I. Jurisdiction

The Respondent, a corporation with its principal office in Deerfield Beach, Florida, manufactures and distributes building materials such as cement, aggregate and concrete block at several facilities in the State of Florida, including the facility in Ft. Pierce involved in this proceeding. The Respondent annually purchases and receives at its Florida facilities goods and materials valued in excess of \$50,000 directly from points outside the State of Florida. The Respondent admits and I find that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. Alleged Unfair Labor Practices

As noted above, the Respondent manufactures cement, ready-mix concrete, aggregate and concrete blocks used in construction and sells and distributes these products along with sand, mortar and other related products used primarily in building construction. The Respondent operates manufacturing and distribution facilities throughout the State of Florida, some of which have only ready-mix operations while others have both ready-mix and block operations. The Respondent's main administrative office is located in Deerfield Beach, Florida.

On September 12, 1997, the Union's predecessor, International Union of Operating Engineers, Local 675, AFL-CIO, was certified by the Board as the Section 9(a) representative of a unit of "all full-time and regular part-time operating engineers including mechanic 1s, mechanic 2s, crew persons, yard persons, laborers, terrascapery yard persons, terrascapery plant workers employed by [the Respondent] at its plants located in the counties of Dade, Broward, Palm Beach, Martin and St. Lucie, Florida, excluding all other employees, office clerical employees, guards and supervisors as defined in the Act." In June 1999, Local 675 was merged into the Charging Party Union, Local 487, by the International Union. The Respondent was informed of the merger by letter dated June 15, 1999. Thereafter, the Union assumed representation of the unit employees, administering the existing collective-bargaining agreement, filing grievances and negotiating with the Respondent.

(December 20, 2001). See also *Local Lodge No. 1424, IAM, AFL-CIO (Bryan Mfg. Co.) v. NLRB*, 362 U.S. 411 (1960).

² In its brief, the Respondent renews its objection to receipt into evidence of a position letter submitted by counsel for the Respondent during the investigation of the charges, relying upon certain language in the letter intended to limit its use. I shall adhere to my ruling based upon well-established Board precedent that such letters are admissible as admissions by a party, unless the party has disavowed the statement before the hearing. *Masillon Community Hospital*, 282 NLRB 675 fn. 5 (1987). Accord: *McKenzie Engineering Co.*, 326 NLRB 473, 485 fn. 6 (1998); *Hogan Masonry*, 314 NLRB 332, 333 fn. 1 (1994).

On August 30, 2001, the Respondent and the Union executed a new collective-bargaining agreement, effective by its terms from July 1, 2001 through June 30, 2004. At Article I of the contract, the Respondent agreed to recognize the Union as the exclusive bargaining representative for:

all Operating Engineers at [the Respondent's] plants located in the Counties of Dade, Broward, Palm Beach, Martin and St. Lucie, Florida, *and other employees coming under their craft jurisdiction* excluding all other employees, executives, administrative, professional office, plant clerical employees, office clerical employees, guards and supervisors, as defined in the N.L.R.A.

(emphasis added). The wage schedule at Appendix A of the contract identifies six classifications of unit employees: Mechanic 1, Mechanic 2, Crew Person, Yard Person, Laborer and Plant Utility Worker. There is no dispute that the yard person classification in the Respondent's block plants is also referred to as a forklift operator.

When the current contract was negotiated in 2001, the Respondent had the following facilities within the geographic jurisdiction of the Union: cement, ready-mix, aggregate and block operations at the Pennsucco plant in Dade County; ready-mix and block operations at Pompano Beach in Broward County; ready-mix and block operations at Mangonia in Palm Beach County; and a ready-mix and aggregate operation at Ft. Pierce in St. Lucie County. In addition, the Respondent had several exclusively ready-mix facilities within the counties covered by the contractual recognition clause. There is no dispute that the Union represented all employees performing work described in the contract's recognition clause and wage schedule, within those counties, except for a group of 12 employees at the Respondent's Mangonia block operation. For some reason, these employees had historically been excluded from the unit even though the Mangonia block operation is identical to that at Pompano Beach and Pennsucco and the employees perform the same work as unit employees.³ The Union unsuccessfully sought to include these employees in the unit by filing a grievance and unfair labor practice charges in October 2001. The Union ultimately withdrew the charges in February 2002 and has, apparently, not pursued the grievance. In any event, at the time of the hearing, the Mangonia block plant employees were still not covered by the collective-bargaining agreement.

There is no dispute that, prior to August 2002,⁴ all employees in the Respondent's ready-mix and aggregate operation at the Ft. Pierce facility were included in the unit and covered by the collective-bargaining agreement. There is also no dispute that, prior to August, the Respondent did not have any block operation at this facility. The closest block plants were in Melbourne, Florida, which is outside the Union's geographic jurisdiction and coverage of the contract, and Mangonia. Steve Kramer, the Respondent's Area Operations Manager responsible for the block plants in Pompano and Mangonia, testified that the Respondent decided in the summer 2002 to set up a block distribution operation in Ft. Pierce to try to tap a growing, but previously unserved market, for the Respondent's concrete blocks. Rather than

³ The Union's business manager, Gary Waters, and business representative, John Mullen, testified that they believed these employees had been excluded because they were represented by the Teamsters Union at some point in the past. Neither witness had any first hand knowledge of these facts and I shall not rely upon their speculation as to the cause of this historical exclusion.

⁴ All dates hereafter are in 2002, unless otherwise indicated.

manufacture blocks at Ft. Pierce, Kramer set up the operation so that blocks would be shipped by rail or truck primarily from the Pennsocco plant in Miami. Customers in the Ft. Pierce area who purchased blocks could pick them up at the Ft. Pierce facility using their own vehicles or private trucking companies. In order to staff this operation, Kramer transferred Tom Hendrickson, a forklift operator from the non-unit Melbourne block plant, to Ft. Pierce.

There is no dispute that Kramer set the wages for the employee transferred from Melbourne to Ft. Pierce without discussion with the Union. The Respondent's payroll records show that, when first transferred, Hendrickson received the same rate of pay he had been receiving at Melbourne, i.e. \$13.60/hour. This was less than the contractual wage rate for yard person or forklift operator. The Respondent's payroll records show that, in January 2003, Hendrickson was given a raise to \$14.51/hour. Kramer testified that he determined the amount of Hendrickson's pay by looking at the wage scales for the block employees at Melbourne and Mangonia, the closest facilities with similar operations, and by adding \$.50 lead man's pay to compensate for additional duties assigned to Hendrickson. It is also undisputed that Hendrickson continued to receive the same package of benefits he had received at the non-unit facility in Melbourne after his transfer to Ft. Pierce. These benefits differed from those contained in the collective-bargaining agreement.

Mullen, the Union's business representative, testified that he first saw Hendrickson working at the Ft. Pierce facility during a visit to the ready-mix plant there in August. He observed Hendrickson operating a forklift in the southeast corner of the yard, loading and unloading block from trucks. Mullen testified that he had never seen anyone loading or unloading blocks at this facility before the August visit. According to Mullen, Hendrickson was performing work no different than what forklift operators at other block plants in the unit do. Mullen approached Hendrickson, introduced himself as the Union's representative, and asked about Hendrickson's wages and benefits. When Hendrickson told Mullen what he was being paid, Mullen told him that was not the correct rate under the contract. Mullen also asked Hendrickson if he was in the Union's pension plan and Hendrickson answered in the negative. Mullen recalled that, when he asked Hendrickson where he came from, Hendrickson replied either Vero Beach or Melbourne.

Mullen testified further that, after finishing his visit, he called Waters on his cell-phone as he was driving south from Ft. Pierce and told Waters what he had seen and learned from speaking to Hendrickson. After speaking to Waters, Mullen called Kramer, whom he knew to be the area manager in charge of that facility. According to Mullen, he told Kramer that Hendrickson falls under the contract and that he was not being paid the proper rate. Kramer told Mullen that he would talk to his boss and get back to Mullen. When he didn't hear from Kramer after a couple weeks, Mullen called him again and asked what was going to be done about the operator in Ft. Pierce. Mullen testified that Kramer told him he had spoken to his boss and they were going to leave things as they were. Mullen testified further that he has visited Ft. Pierce at least a half-dozen times since speaking to Kramer and that he has always observed Hendrickson performing the same function, i.e., using the forklift to load, unload and otherwise move blocks around the yard.

Waters testified that, after Mullen advised him that Hendrickson was not being paid the correct rate under the contract, and that Mullen had been unable to resolve the matter with Kramer, he submitted a grievance by fax on September 23 to the Respondent's Human Resources Director, Max Hoynacki. Hoynacki responded to the grievance the same date with a letter claiming that the issue was not arbitrable. Hoynacki stated in his letter that the block

distribution operation at Ft. Pierce was “a non-union operation and the position of fork truck operator, for this location, is not part of the bargaining unit.” On October 18, Waters sent a letter to Hoynacki requesting information regarding the fork lift operator at Ft. Pierce. Specifically, Waters requested the employee’s name, address, telephone number, date of hire, classification, rate of pay and benefits provided by the Respondent. Waters stated in the letter that this information was necessary for the Union to properly administer the contract and to assess the Respondent’s refusal to apply the grievance procedure to this dispute and its position that the dispute was not arbitrable. When Waters did not receive a response to his request, he wrote another letter to Hoynacki, on October 25, again seeking the information. The Respondent admitted, in its answer to the complaint, that the Union requested, and that it has refused to supply, this information.

In addition to the testimony of Waters and Mullen, the General Counsel also called as witnesses two unit employees who work as yard men in the Respondent’s ready-mix and aggregate operation at Ft. Pierce, Joshua Melton and Randy Brown. Melton and Brown, who spend almost their entire day moving material in the yard, using wheelers, loaders and other equipment, testified that they have observed Hendrickson using a forklift to load and unload trucks and rail cars and stack blocks in the yard. According to Melton and Brown, they have not seen him do any other work. They testified further that they have assisted Hendrickson with his work, when he or their supervisor, Bill Sherman, asks, by moving the railcars into position for him to unload them, or crushing defective block, or cleaning out the sand bins. Brown, who has worked in other facilities of the Respondent having block operations, also testified that the work performed by Hendrickson is similar to what forklift operators do at these facilities. Both witnesses acknowledged that they do not watch Hendrickson every minute of the day and that they do not know what he does when they are not watching. Melton and Brown testified that Hendrickson uses the same time clock to punch in and out of work and Brown testified that Hendrickson uses the same break room as other employees at the facility. On cross-examination, both witnesses acknowledged that the amount of time they spend moving rail cars for Hendrickson or assisting him with other tasks is a small part of their work.

Kramer testified as an adverse witness for the General Counsel under Rule 611(c) of the Federal Rules of Evidence and as the Respondent’s main witness. He testified that the position at the Ft. Pierce block distribution operation, occupied by Hendrickson, is different from the yard person/forklift operator position at Pompano and Pennsucco that is included in the bargaining unit.⁵ According to Kramer, the unit employees spend virtually their entire time operating a fork lift, with about half the day spent clearing the production lines inside the block manufacturing plant and the remainder of the day spent loading and unloading trucks in the yard. In contrast, according to Kramer, Hendrickson spends only 25% of his day loading and unloading trucks. Because blocks are not manufactured at Ft. Pierce, he does not spend any time clearing production lines. From Kramer’s testimony, it would appear that most of Hendrickson’s day is spent dealing with customers, handling spot transactions, accepting payment for deliveries, processing paperwork associated with the sale of block from that facility and ordering material from Pennsucco or one of the other block manufacturing facilities to meet customer needs. In support of this testimony, the Respondent introduced a number of documents purported to have been handled by Hendrickson in carrying out these job functions. However, few of the documents bore a signature or other objective evidence that Hendrickson was involved in the

⁵ Presumably, the position at Ft. Pierce is also different from the yard person position at the Mangonia plant which has historically been excluded from the unit.

transaction. For the most part, the only evidence that a particular document was one used by Hendrickson to conduct a transaction was Kramer's testimony. In addition, all of the documents offered by the Respondent were dated in 2003, several months after Hendrickson began working at the Ft. Pierce facility, and after the Union had made an issue of his unit placement.

In further support of its position that Hendrickson's job was a non-unit position, the Respondent offered into evidence a job description for a "Customer Service/Dispatch/Forklift Operator" at the Ft. Pierce Block facility. Sarah Fain, a Human Resources Representative employed in the Respondent's Deerfield Beach office, testified that she prepared this job description in November as part of a package of job descriptions she was instructed to complete. She used a software program containing canned language and supplemented it with information provided by Kramer regarding the "essential duties and responsibilities" of the position. The job description itself does not show the date it was prepared, although there is a line on the form for this information. Fain acknowledged that the job description was never approved, explaining the blank spaces for "approved by" and "approved date". Kramer testified that this job description, by itself, does not accurately represent Hendrickson's position. According to Kramer, the new job description together with the existing job description for the unit Yard Person (Forklift Operator) is an accurate representation of Hendrickson's duties and responsibilities. The Respondent's payroll records in evidence show that, notwithstanding the title on the job description introduced at the hearing, Hendrickson is classified as a "forklift operator" in the Respondent's records.

A comparison of the two job descriptions reveals a number of similarities, which were acknowledged by Kramer. Thus, the unit forklift operators are also responsible for assisting customers in selecting inventory, performing last quality control inspection on inventory leaving the yard, maintaining a high level of customer service, and conducting physical inventory, in addition to the more routine loading and unloading of trucks for customers, clearing of production lines and moving block around within the yard. According to Kramer, the difference between the unit position and the position at Ft. Pierce is in the amount of time spent doing these customer related and other duties. Because Hendrickson is the only block employee at Ft. Pierce, he is the contact person for customers, dispatch and sales staff in the area serviced by the Ft. Pierce facility. At Pompano and Pennsucco, there are supervisors, a plant manager and dispatch personnel on site to deal with customers and to handle the paperwork responsibilities related to sales and dispatch that Hendrickson is responsible for in Ft. Pierce.

Kramer testified regarding other differences between Hendrickson's job and the unit position. According to Kramer, Hendrickson has an office at the Ft. Pierce facility with a computer, copier and fax machine where he transmits orders placed by customers who come to the facility to the dispatch office and receives the carbon tickets from dispatch which he uses to collect payment and deliver the material to the customer.⁶ Hendrickson also maintains in this office files containing the paperwork documenting the transactions. Kramer testified further that Hendrickson is responsible for maintaining daily cash reports for moneys received from customers, doing the monthly physical inventory of all block products at the facility, and ordering block and other material to meet orders to be filled from the Ft. Pierce facility. According to Kramer, these tasks are handled by supervisors, sales or dispatch employees at the Pompano

⁶ It is undisputed that the dispatchers prepare the paperwork, including determining the price to be paid by the customers. When Hendrickson receives the ticket, he merely fills the order and collects payment from the customer.

and Pennsucco facilities. In quantifying the amount of time spent by Hendrickson on non-forklift duties, Kramer testified that Hendrickson spends 20% of his day performing inventory-related tasks, which includes ordering material, 10% of the day dealing with customers who come to the facility to purchase and receive products, 5% of the day tracking cash receipts and 25% of the day physically loading and unloading trucks and rail cars.⁷ In describing Hendrickson's job, Kramer admitted that the position has evolved over time since Hendrickson was first transferred to Ft. Pierce. According to Kramer, because this was the Respondent's first foray into the Ft. Pierce market and the first block operation that was exclusively a distribution facility, he did not have a specific job description in mind when the operation started. Over time, Kramer has defined the position to meet whatever needs arose in carrying out the operation.

It is undisputed that Hendrickson's wages and benefits differ from those of unit employees in most respects.⁸ Although the Respondent attempted to show that Hendrickson, as a non-unit employee, was subject to different rules regarding discipline and attendance, the parties' collective-bargaining agreement in fact provides that unit employees are subject to company-wide rules. As previously noted, Hendrickson, like unit employees, is hourly paid, and punches the same time clock as unit employees. Because he is treated as a non-unit employee by the Respondent, however, he receives overtime pay only for hours worked in excess of 40 in a week. Unit employees receive overtime when they work more than 8 hours in a day, regardless of the number of hours for the week. Kramer testified that, unlike unit employees, Hendrickson sets his own work schedule, dictated by the needs of customers and the scheduling of orders each day. Unlike unit employees, Hendrickson has no immediate supervisor on site. According to Kramer, Hendrickson reports directly to him. Bill Sherman, the Respondent's supervisor in charge of the Ft. Pierce ready-mix and aggregate operation, has no direct authority over Hendrickson. As previously noted, Kramer's testimony that Hendrickson does not use the break room that unit employees use at Ft. Pierce was contradicted by Brown, who works at Ft. Pierce and testified that Hendrickson in fact uses the break room. Brown was corroborated on this point by Sherman, who testified for the Respondent. It is undisputed that, when Hendrickson took a vacation, around the time of the hearing, he was replaced by a forklift operator from the Mangonia block operation. According to Kramer, the replacement was not responsible for any of Hendrickson's non-forklift operator duties during this period. Instead, Kramer spent more time at the facility, or the sales and dispatch employees handled these other duties.

The position letter submitted by counsel to the Board's Regional Office on November 23, during the investigation of these charges, is inconsistent with some of Kramer's testimony. For example, the Respondent's counsel referred to Hendrickson in the letter as a forklift operator." In addition, counsel described Hendrickson's job as less complicated than that of the union-represented forklift operators, stating that Hendrickson spent most of his day in the yard, moving block, occasionally going into the "shack" to retrieve orders from dispatch off the computer. Counsel also reported in November that most of the block distributed from the Ft. Pierce facility

⁷ Kramer also testified that Hendrickson spends 15-20% of his day handling paperwork related to customer orders, 5% handling C.O.D. sales, and 15-20% ordering block from other facilities. It appears that at least some of this is already included in the estimates quoted above for dealing with customers, tracking cash and maintaining inventory. Otherwise, Kramer's testimony would amount to more than 100% of Hendrickson's day.

⁸ Unit and non-unit employees do have some benefits in common, most notably health insurance.

came from the non-unit Melbourne facility. Both Kramer and Javier Acevedo, the Pennsucco plant manager, testified at the hearing that it is the Pennsucco plant that supplies most of the product for Ft. Pierce customers. According to Acevedo, this is the way the operation was set up from the beginning, with Pennsucco intended as the primary source of block sold in Ft. Pierce.⁹

Although Kramer gave the most extensive testimony regarding Hendrickson's duties and responsibilities, he acknowledged that he is not physically present at the Ft. Pierce facility on a daily basis. He usually visits the facility once a week. His testimony was based more on his vision of what the job involved as the individual who set up the Ft. Pierce block distribution facility. Other witnesses who testified for the Respondent were also not in a position to physically observe Hendrickson on a daily basis. Although Acevedo did have telephone contact with Hendrickson when he placed orders for block, he had not been to the facility and relied upon Kramer's description regarding how the Ft. Pierce operation worked. Sherman, even though he is physically present at Ft. Pierce on a daily basis, acknowledged that he spends his day in the ready-mix plant with his back toward the yard where block is stored and where Hendrickson works. In fact, of all the witnesses, Melton and Brown, the yard persons in the Ft. Pierce ready-mix and aggregate operation, were probably in the best position to physically observe Hendrickson since they spent most of their day in the ready-mix and aggregate yard within sight of Hendrickson's block operation. Kramer, the incumbent of the disputed position, who would have been the best witness regarding his duties, responsibilities and daily activities, was not called as a witness in this proceeding. In fact, on June 18, 2003, Kramer approved Hendrickson's request to take a vacation that coincided with the hearing dates.

The issue in this case, as framed by the pleadings, is whether the Respondent violated Section 8(a)(5) by refusing to apply the collective-bargaining agreement to the position occupied by Hendrickson at the Ft. Pierce facility and by refusing to furnish the Union with information regarding that position. Because the Respondent essentially admits that it has not applied the contract to this position and has not provided the requested information to the Union, the case boils down to whether the block operation employee at Ft. Pierce, Hendrickson, should be included in the unit, an issue typically addressed in initial representation case proceedings or post-certification unit clarification proceedings.¹⁰ There is no question that the block distribution operation at Ft. Pierce was a new operation and that the position occupied by Hendrickson was new to the facility.¹¹ The General Counsel emphasizes the similarities between the work Hendrickson was doing and that done by unit yard persons while the Respondent emphasize

⁹ When counsel asked Acevedo if he knew Hendrickson, Acevedo candidly answered, "he's the guy who unloads the block we ship to him" in Ft. Pierce.

¹⁰ On the second day of the hearing, the Respondent proposed, as a basis for settling the case, that it would furnish the information to the Union and accept deferral of the charges to arbitration. Because this case raises issues as to unit placement and/or accretion, it is not appropriate for deferral, even assuming the Respondent was now willing to furnish the information and arbitrate the Union's grievance. See *Tweddle Litho, Inc.*, 337 NLRB No. 102 (June 13, 2002); *Williams Transportation Co.*, 233 NLRB 837 (1977).

¹¹ The situation here is thus markedly different from that at the Mangonia plant. It is well-established that, where the parties to a bargaining relationship have historically excluded a group of employees from an established bargaining unit, even by mistake, the Board will not clarify the unit to include those employees unless substantial changes have occurred creating a real doubt whether the excluded employees should now be included in the unit. *Gitano Group, Inc.*, 308 NLRB 1172, 1173-1174 (1992).

the differences. Whereas the General Counsel contends that Hendrickson was just another forklift operator, the Respondent argues that he was more of a customer service/dispatch employee, lacking a community of interest with other employees in the unit. In the General Counsel's view, because Hendrickson was performing work traditionally done by unit employees, the burden is on the Respondent to prove there is a sufficient dissimilarity to exclude him from the unit. In the Respondent's view, the issue here is one of accretion and the Board's policy against adding employees to a unit without an election, unless the new group of employees share an overwhelming community of interest with unit employees, should apply.

In *Developmental Disabilities Institute, Inc.*,¹² the Board held that, once it is established that a new classification is performing the same basic function as a unit classification historically had performed, the new classification is properly viewed as belonging in the unit rather than being added to the unit by accretion. Even where there are some differences between the old and new jobs due to technological advances, the new position is part of the unit where the functions performed are essentially the same. *Premcor, Inc.*, 333 NLRB 1365 (2001). See also *Gourmet Award Foods, Northeast*, 336 NLRB 872 (2001) (employees newly hired into classifications plainly included in the unit do not raise accretion issues). In *The Sun*,¹³ the Board adopted the standard to be applied in unit clarification proceedings involving bargaining units defined by the work performed. If the new employees perform job functions similar to those performed by unit employees, as defined in the unit description, the Board will presume that the new employees should be added to the unit, unless the unit functions they perform are merely incidental to their primary work functions or are otherwise an insignificant part of their job. The Board placed the burden on the party seeking to exclude such employees to show that the new group is sufficiently dissimilar from the unit employees that the existing unit, if it included the new employees, would no longer be appropriate. *Id.* at 849. This test is different from the traditional test in accretion cases. In a typical accretion case, the Board considers a number of factors, including the integration of operations, centralization of management and administrative control, geographical proximity, similarity of working conditions, skills and functions, common control of labor relations, collective bargaining history and employee interchange, to determine whether the new group of employees share a sufficient community of interest with the existing unit to be included without an election. In a typical accretion case, the burden is generally on the party seeking to include the new group to show that the new group has little or no separate group identity. *Gitano Group, Inc.*, 308 NLRB supra at 1174. Accord: *Archer Daniels Midland Co.*, 333 NLRB 673 (2001) (Board distinguished *The Sun*, supra, on basis that unit at issue was not functionally defined).

I find initially that the parties have agreed to a functionally defined bargaining unit and that the test adopted by the Board in *The Sun*, supra, is applicable. The contractual recognition clause, which modified the language in the certification, defines the unit as "all Operating Engineers... and other employees coming under their craft jurisdiction." In contrast to the Union's certification, the unit defined by the contract no longer enumerates specific job classifications. The parties' intent, obvious from the face of the contract, is to include in the unit any employee performing work which is defined as Operating Engineers work within the geographic jurisdiction of the Union.¹⁴ Because operation of a fork lift has historically been

¹² 334 NLRB 1166 (2001).

¹³ 329 NLRB 854 (1999).

¹⁴ The historic exclusion of those operating engineers working in the Respondent's block operation at Mangonia, whether by agreement or acquiescence, predated the contract and does

Continued

considered the work of operating engineers, and because the employee transferred to Ft. Pierce to work in the block distribution operation admittedly operates a forklift at least 25% of his time, I shall presume that this position should be added to the unit, absent a showing by the Respondent that Hendrickson's operation of the forklift is merely incidental to his primary work function or an insignificant part of his work.

The only witness to testify that Hendrickson performs functions other than operating a forklift was Kramer. The General Counsel's witnesses testified that the only thing they've ever seen Hendrickson do is operate the forklift. Acevedo, who only knows Hendrickson as the guy who unloads the block shipped to Ft. Pierce from Pennsucco, has never seen Hendrickson at work. Although he has spoken to Hendrickson on the phone occasionally regarding orders for blocks or customer concerns about block shipped from Pennsucco, Acevedo was not in a position to say how much of Hendrickson's job would be spent on such duties. Sherman, the on-site supervisor at Ft. Pierce, admitted he is not in a position to observe what Hendrickson does all day. The only person who was in a position to tell me what he does all day, Hendrickson, was conveniently absent on a vacation approved by the Respondent at a time when it knew the hearing on this issue was scheduled. While not drawing any adverse inference from his absence, I shall weigh the Respondent's choice not to offer this testimony in evaluating Kramer's testimony.

As the individual who established the block distribution operation at Ft. Pierce and decided to transfer Hendrickson to staff it, Kramer certainly was a witness with knowledge as to the duties and responsibilities of the position. However, his testimony was not entirely credible. I note that his testimony was not consistent with the statements made by the Respondent's counsel during the investigation. In the position statement, in contrast to Kramer's testimony, the Respondent sought to downplay the additional responsibilities Hendrickson had, indicating that his position was not as complex as a unit position. In contrast to Kramer's description, suggesting that the bulk of Hendrickson's time was spent in the office handling paperwork, counsel advised the Region that Hendrickson spent most of the day in the yard, moving block, and only occasionally went into "the shack" to retrieve orders from dispatch. This earlier admission by the Respondent is consistent with the testimony of the General Counsel's witnesses and more reliable than Kramer's testimony developed after the complaint had issued in this case.

In finding Kramer's testimony unreliable, I also note that the documents introduced at the hearing to show Hendrickson's involvement in taking orders from customers, collecting payments, ordering supplies, etc. all post-date the dispute that arose over Hendrickson's unit placement by several months. I find it significant that no documents were offered from August through November 2002 showing Hendrickson's involvement in these non-forklift operator duties. In addition, many of the documents do not bear Hendrickson's name or signature and those that do show no more than that he signed for a delivery of product. Even assuming these documents and Kramer's testimony were sufficient to establish that Hendrickson dealt with customers who came to the facility to buy block, signed for deliveries, ordered additional blocks or other material needed to fulfill orders, these additional duties were incidental to his primary function, as the only employee in the block department at Ft. Pierce, of loading and unloading blocks for the Respondent's customers and moving block within the yard.

not affect its application to new groups of employees that come into existence during the term of the contract or in the future.

I also found Kramer's testimony regarding the percentage of time spent by Hendrickson on different tasks to be exaggerated. There is no dispute that the Respondent has a central dispatch operation and a separate sales force that handles most orders from customers, whether at Ft. Pierce, Mangonia, Pompano or Pennsucco. Kramer himself testified that only about 10% of the orders at Ft. Pierce came from customers walking in off the street. It is dispatch which generates the paperwork for the orders, establishes the amount of payment to be collected and tells Hendrickson how much to load and for whom. Dispatch is also in a better position than Hendrickson to know how much block is needed at Ft. Pierce to satisfy customer orders because they have access to all the orders that have been received by the Respondent, whether through a sales rep., over the phone, or by Hendrickson on the spot. Even though Hendrickson may collect payment from customers who pay C.O.D., he does no more with these payments than record them on a form and turn them over to the sales department to process and deposit in the bank. In light of the limited nature of these additional duties Hendrickson has as the only on-site block employee, it is inconceivable that he would be spending 75% of his time in non-forklift operations.

Accordingly, based on the above and the record as a whole, I find that Hendrickson was primarily a yard person/forklift operator and that the additional duties identified by Kramer are only incidental to the performance of this job.¹⁵ Because I find that the Respondent has not met his burden of proof under *The Sun*, supra, I conclude that the Ft. Pierce block distribution employee should be included in the contractually recognized unit. I would reach the same result, even if the unit were not found to be functionally defined, under the Board's holding in *Developmental Disabilities Institute, Inc.*, supra. The credible evidence in the record convinces me that Hendrickson is performing the same basic functions as the yard persons/forklift operators in the unit have historically performed and that he should be included in the unit. Based on these findings, I conclude that the accretion analysis urged by the Respondent is inapposite. I also note that, unlike a typical accretion case, Hendrickson is not working in a new job classification,¹⁶ or at a new facility, nor is he part of a historically unrepresented group of employees. The Union has always represented employees at Ft. Pierce, including ready-mix employees who work in the yard, and has always represented yard persons in other block operations.¹⁷ Thus, the transfer of Hendrickson from Melbourne to Ft. Pierce is not a true accretion.

¹⁵ As noted previously, Kramer acknowledged that the job description for the unit classification includes many of the same customer service, inventory and other responsibilities he described for Hendrickson. Thus, the difference between the unit position and Hendrickson's job was more a quantitative than a qualitative difference in the work performed.

¹⁶ I attach no weight to the job description for a "customer service/dispatch/forklift operator" introduced into evidence by the Respondent. This document, admittedly prepared after the Union sought inclusion of Hendrickson in the unit, and never approved, is nothing more than a self-serving document prepared to bolster the Respondent's claim of exclusion. Moreover, Kramer admitted that the job description was not accurate because the incumbent of this "new" position also had to perform the duties described in the existing job description for the unit position.

¹⁷ As the Board recently re-affirmed, there is nothing inherently inappropriate in including batch plant (ready-mix) employees and block plant employees in a single unit. See *Ready-Mix USA, Inc.*, 340 NLRB No. 107 (October 24, 2003).

In reaching my conclusion, I have considered the fact that not all yard persons/forklift operators employed by the Respondent in the Union's geographic jurisdiction have been included in the unit. However, I find that the historical exclusion of similar employees at Mangonia is nothing more than a red herring. The fact that the Union had allowed the Respondent, by mistake or otherwise, to exclude from the unit a group of employees who are covered by the contractual recognition clause does not establish that the Respondent can create new positions, assign them bargaining unit work, and unilaterally exclude them from the unit. By doing so here, the Respondent has violated Section 8(a)(5) and (1) of the Act, as alleged in the complaint and I so find.

Having found that the yard person/forklift operator employed in the Ft. Pierce block distribution operation is a unit position, I find further that the information requested by the Union on October 18 is presumptively relevant and necessary for the performance of the Union's representational functions. *Ohio Power Co.*, 216 NLRB 987, 991 (1975), *enfd.* 531 F.2d 1381 (6th Cir. 1976). Even if there were any ambiguity or doubt as to the unit placement of this position, the Union would be entitled to the information to determine whether the contract had been violated. In the face of the information Mullen had, i.e. an individual was seen operating a forklift similar to the work done at other unit facilities, and the individual told Mullen that he was receiving wages and benefits other than those provided by the collective-bargaining agreement, the Union was entitled to investigate for itself whether the Respondent was violating the agreement. The information sought by Waters in his letter was relevant to such an investigation and was necessary for the Union to determine whether to file or pursue a grievance. *Phoenix Coca-Cola Bottling Co.*, 337 NLRB No. 157 (August 1, 2002); *United Graphics, Inc.*, 281 NLRB 463 (1986). Because the Respondent admits that it did not furnish the requested information, I find that the Respondent has violated Section 8(a)(5) and (1) of the Act as alleged in the complaint.

Conclusions of Law

1. By failing and refusing to recognize the Union as the bargaining representative of the yard person/forklift operator(s) employed by the Respondent at its Ft. Pierce, Florida block distribution facility and by failing and refusing to apply the parties' collective-bargaining agreement to that employee, since August 2002, the Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(1) and (5) and Section 2(6) and (7) of the Act.

2. By failing and refusing to furnish the Union, since October 18, 2002, with the information requested by the Union regarding the yard person/forklift operator working at Ft. Pierce, the Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(1) and (5) and Section 2(6) and (7) of the Act.

Remedy

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act. Specifically, I shall recommend that the Respondent be ordered to recognize and bargain with the Union as the representative of any employee working as a yard person/forklift operator at the Ft. Pierce block distribution facility and to apply the terms and conditions of the collective-bargaining agreement to such employees retroactive to the date in August 2002 that Hendrickson began working in that position. The Respondent shall

also be required to make the employee whole for any loss of wages and benefits he suffered as a result of the Respondent's unilateral exclusion of his position from the unit, plus interest, in accordance with *Merryweather Optical Co.*, 240 NLRB 1213, 1216 fn. 7 (1979); *Kraft Plumbing & Heating*, 252 NLRB 891 fn. 2 (1980) enfd. mem. 661 F.2d 940 (9th Cir. 1981); *Ogle Protection Service*, 183 NLRB 682 (1970) enfd. 444 F.2d 502 (6th Cir. 1971); and *New Horizons for the Retarded*, 283 NLRB 1173 (1987). I shall also recommend that the Respondent be ordered to furnish the requested information to the Union so that it may police the Respondent's compliance with the collective-bargaining agreement.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended:¹⁸

ORDER

The Respondent, Tarmac America, Inc., Deerfield Beach, Florida, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Failing and refusing to recognize International Union of Operating Engineers, Local 487, AFL-CIO ("the Union") as the bargaining representative of the yard person/forklift operator(s) employed by the Respondent at its Ft. Pierce, Florida block distribution facility.

(b) Failing and refusing to apply the collective-bargaining agreement between the Respondent and the Union to the yard person/forklift operator(s) employed by the Respondent at its Ft. Pierce, Florida block distribution facility.

(c) Failing and refusing to furnish the Union, upon request, with the information that is relevant to, and necessary for, the performance of its statutory functions as the employees' collective-bargaining representative.

(d) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Recognize and, upon request, bargain collectively in good faith with the Union concerning the wages, hours and terms and conditions of employment of the yard person/forklift operator(s) at the Ft. Pierce facility.

(b) Apply all the terms of the collective-bargaining agreement, including but not limited to the grievance arbitration provision and wage and benefits provisions, to the yard person/forklift operator(s) at the Ft. Pierce facility.

¹⁸ If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

(c) make whole the employee(s) in the yard person/forklift operator position at Ft. Pierce for any wages and benefits lost as a result of the failure to apply the contract to this position since August 2002, in the manner set forth in the remedy section of this decision.

5 (d) Furnish the Union with all the information it requested in its October 18, 2002 letter.

(e) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel
10 records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(f) Within 14 days after service by the Region, post at its facilities in the Counties of
15 Dade, Broward, Palm Beach, Martin, and St. Lucie, Florida where employees represented by the Union are employed, copies of the attached notice marked “Appendix.”¹⁹ Copies of the notice, on forms provided by the Regional Director for Region 12, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places
20 where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former
25 employees employed by the Respondent at any time since August 1, 2002.

(g) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that
30 the Respondent has taken to comply.

Dated, Washington, D.C.

Michael A. Marcionese
Administrative Law Judge

45 _____
¹⁹ If this Order is enforced by a Judgment of the United States Court of Appeals, the words in the notice reading “POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD” shall read “POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD.”
50

APPENDIX

NOTICE TO EMPLOYEES

**Posted by Order of the
National Labor Relations Board
An Agency of the United States Government**

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union
Choose representatives to bargain with us on your behalf
Act together with other employees for your benefit and protection
Choose not to engage in any of these protected activities

WE WILL NOT fail and refuse to recognize International Union of Operating Engineers, Local 487, AFL-CIO, the Union, as the exclusive collective-bargaining representative of yard person/forklift operator(s) we employ at our Ft. Pierce, Florida facility.

WE WILL NOT fail and refuse to apply the terms of our collective-bargaining agreement with the Union to yard person/forklift operators employed at Ft. Pierce, Florida.

WE WILL NOT fail and refuse to furnish the Union, upon request, with all information relevant to, and necessary for, the Union to represent you.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL recognize, and upon request, bargain with the Union as the collective-bargaining representative of yard person/forklift operator(s) employed at the Ft. Pierce facility.

WE WILL apply the terms of our current collective-bargaining agreement with the Union to that position and WE WILL make the employee occupying that position whole for any wages and benefits lost as a result of our failure to apply the collective-bargaining agreement since August 1, 2002.

WE WILL furnish the Union with the information it requested in a letter to us dated October 18, 2002.

TARMAC AMERICA, INC.

(Employer)

Dated _____ By _____
(Representative) (Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlr.gov.

201 East Kennedy Boulevard, South Trust Plaza, Suite 530, Tampa, FL 33602-5824

(813) 228-2641, Hours: 8 a.m. to 4:30 p.m.

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, (813) 228-2662.